IN THE SUPREME COURT
Appeal from the Court of Appeals

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

DONNA ALICE YOST,

Defendant/Appellant.

Supreme Court No. 119889
Court of Appeals No. 234065
Circuit Court No. 00-1304-AR
District Court No. 00-FY-4070-L

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BRIEF ON APPEAL - APPELLANT

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF THE BASIS OF JURISDICTION

Jurisdiction in the Supreme Court is by leave granted under MCR 7.302.

The Order of the District Court refusing to bind Defendant-Appellant over was entered on September 12, 2000.

The Circuit Court reversed this Order on April 11, 2001.

The Court of Appeals denied Defendant-Appellant's Application for Leave to Appeal on June 6, 2001.

Leave was granted by this Court on March 18, 2002.

STATEMENT OF QUESTIONS INVOLVED

The questions involved were designated by this Court in its Order of March 18, 2002.

1. Whether the refusal of the magistrate to bind the defendant over for trial was an abuse of discretion?

Defendant-Appellant says, "No."

The Circuit Court, by its Order, said, "Yes."

2. What is the appropriate role of the magistrate at a preliminary examination in assessing the credibility of witnesses and how does that assessment affect the bindover decision?

Defendant-Appellant maintains that the magistrate may appropriately assess credibility.

The Circuit Court did not address this question expressly.

3. Whether the reviewing court applied the correct standard of review in this case?

Defendant-Appellant says, "No."

The Circuit Court, by its Order, said, "Yes."

STATEMENT OF FACTS AND PROCEEDINGS

The Opinion of the Circuit Court lays out the extensive evidence that was presented in a seven-day Preliminary Examination before the District Court. That evidence showed only that seven-year-old Monique Yost, Defendant-Appellant Donna Yost's daughter, ingested a fatal dose of Imipramine, an anti-depressant prescribed for bed wetting, under circumstances that cannot be fully reconstructed. The Prosecutor speculated that Donna ground up the pills, mixed them with a drink, and gave the lethal substance to Monique, but there is neither direct nor real circumstantial evidence for this theory. Accordingly, the District Court refused to bind Donna over for trial.

Donna Yost has no history of either child-abuse or mental illness, nor is there a credible motive for her to harm her daughter. Mary Gomez, a neighbor, testified that Donna used neither profanity nor corporal punishment with her children (46a-47a). Other evidence, including Donna's own statements to police, indicate that she did occasionally spank her children, but the normal punishment used in that house was a "time-out." Even Mary Jo Sheldon, a former friend presented by the Prosecutor to show Donna's supposed fear that Monique was about to make accusations of sexual abuse, could say no more than that Donna had slapped Monique's hand -- hardly an example of abusive behavior (48a). In short, Donna is not an abusive person.

Monique, unfortunately, had a hard time in life. She had been sexually abused on at least two occasions, once by a neighbor girl and once by an adolescent boy living with her family. She had been labeled emotionally impaired by her school, and at one point moved from first grade

back to kindergarten when she regressed to infantile behavior, according to David Garcia, a home based specialist with Bay Arenac Community Mental Health who specialized in the treatment of dysfunctional families. (49a-52a).

Monique was also repeatedly picked on by other kids in the neighborhood. In response, she had developed a variety of behaviors which were troubling, such as bed wetting, for which the Imipramine had been prescribed, and cutting all her hair off. She also had a bad habit of running off into the neighborhood, so that her family was continually having to look for her. And she developed an apparent fascination with pill-taking. In addition to her own medication, she saw a great deal in her family, where there is a good deal of asthma, while Kathy Tomlinson, a close family friend who served as surrogate grandmother to the children, is diabetic. At one point when younger, she had swallowed half a bottle of vitamins and had to be taken to the hospital, according to Tomlinson. (53a). She also asked to try some of Kathy Tomlinson's medicine (54a). Her parents had told her that she could "get sick or die" from taking too much medicine, but it was apparently an on-going problem for them. She also had a habit of taking things out of the trash.

Donna tried to get help for Monique and had taken her to Bay County Community Mental Health to address the little girl's problem of not listening, lying, running away from home, leaving for periods of time from the home and off the property, and fighting with her sibling, according to David Garcia. Mr. Garcia also testified that Donna told him Monique was making up stories about being beaten and abused. (55a-57a). The Prosecutor has attempted to turn those stories into a motive for Donna to kill Monique, but the Court will note that *Donna* was the one

who brought the little girl in and volunteered those accusations. She was clearly not trying to hide them.

The Yost children usually spent weekends with Kathy Tomlinson. On the weekend of her death, however, Monique had been forbidden to go because she had run off a week before. On Sunday, October 10, 1999, having been given permission to go out into the yard, she ran off again and did not return for a while. When she did return, Donna was very angry, spanked her once, and told her to lie down on the living room couch for the rest of the afternoon, according to Detective Vosler based on his interview with Donna. (58a-60a). Late in the day, while Mary Gomez and her partner Michael Dedge were visiting, Donna tried to wake Monique for supper. The little girl apparently acted like she was waking, so Donna thought nothing of it until she had tried several times without success to get her fully awake. Michael Dedge then tried to revive her, also without success, and Mary Gomez called "911," according to her testimony. (61a-66a).

Monique was taken to the hospital, apparently still alive, and her stomach was pumped, based on the testimony of Dr. Virani, the Prosecutor's forensic pathologist. (67a). (The contents were not preserved.) They were unable to revive her, however, and she expired later that evening. The police were not involved immediately.

On Monday, Cindy Howell, a representative of the Prosecutor's office called to inform Donna of a meeting scheduled for the next day to have Monique interviewed about her most recent molestation -- something Monique had apparently been dreading -- and was told that the little girl had passed away the evening before. It was only then that a police investigation was

begun. On Tuesday, Det. Dean Vosler went out to interview the family about what had happened. Donna informed him that she had already checked the family's medication basket and everything was in order; she also said that none of the few poisons kept in the house had been gotten into, according to the detective. (68a-77a).

The next day, however, Lonny Yost, Donna's husband and Monique's father, went upstairs and found an open bottle of Imipramine spilled on the floor. The area was one where there had been a number of people, including Donna, in the past few days, and no one remembered seeing the pills on the floor. (How the pills got there has never been explained, though there was a dog around.) The family immediately called Det. Vosler to inform him of the discovery. Donna had thrown the pills away some months earlier, thinking that Monique no longer needed them, but as has been seen, the little girl had a habit of retrieving things from the trash, according to Detective Vosler's testimony based on the information he received from the family that day. (78a-82a). Donna rapidly concluded that Monique must have swallowed some of the pills, and she recalled a statement the little girl had made to Kathy Tomlinson about wanting to die, as confirmed by Tomlinson's testimony. (83a); Donna therefore concluded that Monique had used the pills to kill herself, as related by Detective Vosler. (84a-86a).

The autopsy was performed by Dr. Kanu Virani, a pathologist, on that Monday, approximately twenty hours after the child's death. He noted no solid, visible pill residue in her stomach (87a). The toxicology report, which came back from Dr. Michael Evans some time later, indicated a high level of Imipramine in Monique's blood and urine, and Dr. Virani's initial conclusion was that she had somehow ingested "in excess of thirty" pills (88a). His later

calculations raised that estimate as high as 90 to 100 (89a-90a), but the exact number has never been firmly pinned down.[1] Doctor Virani testified that there would have been visible residue in the child's stomach if she had swallowed the pills whole -- actually, the residue would come from the binders and fillers in the pill rather than from the medication itself -- and he discounted the possibility that she might have chewed the pills because they were bitter. Dr. Virani therefore speculated that someone (other than Monique) must have ground up the pills and mixed them with a drink (92a). There has never been any direct evidence of this, only Dr. Virani's statement that the pills could not have been swallowed whole without leaving a residue. Although Dr. Virani testified that he had experience with Imipramine poisoning deaths (93a), he admitted that he had no specific knowledge of the solubility characteristics of the specific pills involved in Monique's death (94a-95a); it is not clear that he could be sure that the particular pills would leave a residue.

An experiment was performed by Dr. David Fleisher, a pharmaceuticist, on the solubility characteristics of Imipramine pills. Thirty pills -- the initial number suggested by the toxicology report -- were placed in hydrochloric acid, the main constituent in stomach fluid, and another thirty in pure water; the pills and liquids were not agitated. Those in acid broke down into a "slurry," a suspension of microscopic particles, within about fifty minutes, while those in plain water did so within an hour and a quarter (96a-99a). Doctor Fleisher also testified that the lipids

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[1] According to Detective Vosler's testimony, it appears that Donna filled two prescriptions sometime the previous June for a total of 120 pills (91a); at the regular dosage of three per day, that was about a six-week supply. Presumably, some pills were taken shortly after the prescriptions were filled, and 46 were found in and around the open bottle. The Prosecutor pointed to the discrepancy, though it is not clear what it proves. The most logical explanation is that Monique did not take as many as 90 pills; the initial report estimated only "in excess of 30."

or fats in food would cause the pills to break down *more* quickly (100a), and that, although he had used only thirty pills for his experiment, the same results would be expected for larger quantities -- up to the 90 to 100 in the later estimates (101a). (The Prosecutor understandably focused on this discrepancy, though it should also be noted that Dr. Virani did not tie his conclusion to any particular number of pills, either.) Based on this, the District Court eventually discounted Dr. Virani's testimony excluding the possibility that the pills could have been swallowed whole.

Doctor Virani, whose psychiatric training is limited to the required course in medical school (102a-103a), also stated categorically that children as young as Monique *cannot* commit suicide, though he admitted that there was no physical impediment to a child taking as many pills as would be involved. Doctor Alan Berman, a clinical psychologist and suicidologist, however, testified at length about suicide in small children and declared that, although it is clearly rare, it does happen -- and is probably more common than the records would show in that doctors rarely consider it (104a-105a). The District Court took account of the relative credentials of the two men in accepting Dr. Berman's testimony; essentially, Dr. Virani, *testifying outside his area of competence*, was unqualified to give an opinion on this issue, as noted by the judge. (106a).

Having heard all the testimony, Judge Leaming of the District Court discharged Donna Yost, finding that there was no sufficient evidence that Monique's death was a homicide to begin with.

The Prosecutor appealed the decision to the Circuit Court. On April 11, 2001, that Court,

the Honorable William J. Caprathe presiding, held that the District Court had erred in refusing to bind the Defendant over. The Circuit Court decided to credit the opinion of Dr. Virani as to the capacity of children to commit suicide, despite the latter's lack of expertise in the field. The Court further regarded Donna Yost's anger with her little girl over her disobedience earlier in the day as a motive for murder and circumstantial evidence that Donna had poisoned Monique. The Court also relied on previous decisions of this Court and the Court of Appeals as lowering the standard of proof in the case of poisoning deaths.

The Defendant then sought Leave to Appeal to the Court of Appeals. The Prosecutor in his response misstated the applicable standard of review, representing the standard with respect to the Circuit Court's decision as more deferential than it in fact should be. The Defendant submits that this may well have influenced the Court of Appeals to "rubber-stamp" the decision of the Circuit Court when it is in fact the decision of the district Court which is entitled to the deference. In any event, the Court of Appeals denied Leave to Appeal on June 6, 2001.

Leave to Appeal was then sought in this Court and granted on March 18, 2002.

ARGUMENT

I

THE MAGISTRATE DID NOT ABUSE HIS DISCRETION IN REFUSING TO BIND DEFENDANT-APPELLANT OVER FOR TRIAL IN THE INSTANT CASE.

STANDARD OF REVIEW

The decision of a magistrate to grant or deny a bindover is discretionary, *e g*, *People* v *Goecke*, 457 Mich 442; 579 NW2d 868 (1998), so review is for abuse of discretion, as will be discussed at greater length below.

DISCUSSION

Every decision of either this Court or the Court of Appeals which Defendant's research has found agrees that the decision of the magistrate in a preliminary examination is discretionary, as the question posed by the Court in its Order granting leave in the instant case implies. As this Court stated the rule in *People* v *Justice (After Remand)*, 454 Mich 334; 562 NW2d 652 (1997):

> The decision to bind a defendant over is reviewed for abuse of discretion. [Citations omitted.] Thus, in this case, we review for abuse of discretion the district court's determination that the evidence was sufficient to warrant a bindover on each count of conspiracy, i.e., we decide whether the evidence was "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [defendant's] guilt[."]

454 Mich at 344; 562 NW2d at 657. *Accord*, *People* v *Goecke*, 457 Mich 442; 579 NW2d 868 (1998); *People* v *Stafford*, 434 Mich 125; 450 NW2d 559 (1990); *People* v *Talley*, 410 Mich

378; 301 NW2d 809 (1981); *overruled in part on other grounds*, *People* v *Kaufman*, 457 Mich 266; 577 NW2d 466 (1998); *People* v *Doss*, 406 Mich 90; 276 NW2d 9 (1979); *People* v *Medley*, 339 Mich 486; 64 NW2d 708 (1954); *People* v *Karcher*, 322 Mich 158; 33 NW2d 744 (1948); *People* v *Dellabonda*, 265 Mich 486; 251 NW 594 (1933).

This is, of course, a narrow standard. As the Court of Appeals explained in *People* v *Stafford*, 168 Mich App 247; 423 NW2d 634 (1988); *aff'd*, *People* v *Stafford*, *supra*:

> An act of discretion by the magistrate, by its very definition, is an exercise of judgment in the decision-making process. Our Supreme Court in *People v Wilson*, 397 Mich 76, 80; 243 NW2d 257 (1976), reh den 397 Mich 962 (1976), quoting *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959), as to the meaning of discretion and abuse of discretion, stated:
>
> > Where, as here, the exercise of discretion turns upon a factual determination made by the trier of facts, an abuse of discretion involves far more than a difference of judicial opinion between the trial and appellate courts. The term discretion itself implies the idea of choice, of an exercise of the will, of a determination made between competing considerations.

168 Mich App at 253; 423 NW2d at 636. Or as this Court defined the "abuse of discretion" standard recently, in another context, in *Bean* v *Directions Unlimited, Inc*, 462 Mich 24; 609 NW2d 567 (2000):

> The Court of Appeals was permitted to reverse the denial of plaintiff's motion for a new trial *only* if that denial was "'so palpably and grossly violative of fact and logic that it evidence[d] not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'"

462 Mich at 34-35; 609 NW2d at 573 (emphasis in original). The District Court's decision, in short, must be affirmed unless it was truly unreasonable.

Although the task of the magistrate in a preliminary examination has been recited many times, there remain some ambiguities. The task is set forth by statute at MCLA 766.13; MSA 28.931:

> If it shall appear to the magistrate at the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

In the instant case, the District Court found insufficient evidence that the alleged offense had been committed. Unfortunately, there is unclarity about the standard to be applied to this determination.

Some statements, generally without much self-conscious discussion, describe the standard for both determinations -- the occurrence of the offense and the defendant's guilt -- as a single "probable cause" standard. *See*, *People* v *Goecke*, *supra*; *People* v *Bellanca*, 386 Mich 708; 194 NW2d 863 (1972). The statutory language, however, applies this standard only to the second determination, the relation of the defendant to the offense. As this Court explained in *People* v *Asta*, 337 Mich 590; 60 NW2d 472 (1953):

> In the instant case it was not required that the justice find the guilt of the defendants established beyond a reasonable doubt. [Citations omitted.] It was essential, however, under the provisions of the statute, to determine that the offense charged had been committed, and that there was probable cause to believe that defendants were guilty.
>
> The matter of "probable cause", as the expression is used in the statute, has reference to the connection of the defendants with the alleged offense rather than to the *corpus delicti*, that is, to the fact that the crime charged has been committed by some person or persons. Such interpretation was placed on the statute by this Court in *People* v. *Matthews*, 289 Mich 440. There the justice of the peace conducting the examination made a preliminary announcement to the effect that there "was probable cause to believe" that the offense charged had been committed. Commenting thereon it was said:
>
> > "Obviously this statement of the justice did not constitute full compliance with the statutory requirement that on an examination the prosecutor must show that the offense charged has been committed and that there is probable cause to believe it was committed by the accused."

337 Mich at 609-610; 60 NW2d 482. *See also*, *People* v *Paille No 2*, 383 Mich 621; 178 NW2d 465 (1970). Clearly, the relatively lenient "probable cause" standard is not to be applied to the initial question whether an offense has occurred in the first place.

Some decisions of this Court have spoken in terms of "proof" of the offense. Thus, the Court declared in *People* v *Medley*, *supra*:

> It is not necessary to establish the defendant's guilt beyond a reasonable doubt before the examining magistrate, but only *to offer proof that an offense not cognizable by a justice of the peace has been committed*, and there is probable cause to believe the defendant guilty thereof.

339 Mich at 492; 64 NW2d at 712 (emphasis added). *See also*, *People* v *Dellabonda*, *supra*. Other decisions speak of "some credible evidence" on each element of the offense. *See*, *People* v *Reigle*, 223 Mich App 34; 566 NW2d 21 (1997).

It is clear, however, that bindover is not automatic even if each element is covered in the prosecution case; it is still necessary for the magistrate to consider all of the evidence. As this Court explained in *People* v *King*, 412 Mich 145; 312 NW2d 629 (1981):

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination "after an examination of the whole matter". Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied.

412 Mich at 154; 312 NW2d at 633. Thus, in that case, the magistrate had been justified in considering exculpatory evidence of provocation and intoxication, rather than simply evaluating the prosecution's direct case. In *People* v *Stafford*, *supra*, on the other hand, the magistrate erred by looking only at the fact that a knife was used to decide that the offense had to be second-degree murder; this was a failure to exercise discretion, which is itself an abuse.

In the instant case, the District Court, after taking extensive evidence, found insufficient evidence that little Monique Yost's death was a homicide. This decision cannot possibly be characterized as "so palpably and grossly violative of fact and logic that it evidence[d] not the

exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." There was simply not enough there.

The Prosecutor's entire case was based, not on proving Donna Yost guilty of the crime, but on trying to prove that Monique could not have swallowed the pills herself. The only evidence that a crime was committed in the first place is the testimony of Dr. Virani that, if the pills had been swallowed whole, there would have been visible residue in the child's stomach during the autopsy the following day. This was heavily refuted by scientific testimony that the solubility characteristics of the particular pills were such that they would have broken down to a slurry within a short time. There was also undisputed evidence that the little girl's stomach had been pumped in an effort to revive her, so it is hardly to be wondered that there would be no solids in her stomach at the time of the autopsy. There is *no* evidence for the Prosecutor's theory that the pills were ground up and mixed with something. The Prosecutor tried to stiffen his case with attempts to recast various of Donna Yost's actions as highly suspicious, but even a slight examination shows the reasoning to be completely fallacious. We are left with the dreadful tragedy of the unexplained death of a small child, but there is no reason to think that this Defendant -- nor anyone else, except probably Monique herself -- caused it.

Doctor Virani also testified that children of Monique's age *cannot* commit suicide. The Prosecutor presumably hoped to use this to show that Monique cannot have taken the pills herself -- leading in turn to the conclusion that someone must have given them to her. Of course, as the District Court noted, Dr. Virani has no appreciable training in psychiatry or psychology, so any opinions he might render on this point are incompetent. The only witness with competence

required "clear abuse of discretion" in the District Court's finding that the occurrence of the crime had not been shown.

Without a finding of evidence of a crime, there was no need to go on to the next step of deciding whether there was probable cause to believe that Donna Yost committed it, although the District Court went on to find that there was none. The Prosecutor presented a wide variety of arguments that Donna's actions were suspicious. These arguments can best be described as "grasping at straws." Most obviously, he tried to construe Donna's statement, "I didn't mean to kill her, I didn't watch her, I didn't watch her, oh, good enough," as some sort of admission of guilt. Any normal person would interpret that statement as anguished self-blame from a mother whose child had suffered an *accidental* death, which might have been prevented by closer supervision.

The Circuit Court focused on the fact that Donna was "angry" with Monique for running off. The evidence shows that Donna used some harsh language with her daughter when she finally came home that Sunday and swatted her (once) on the bottom, presumably with an open hand and probably not very hard. It was the sort of behavior that the parents of small children engage in every day. Any attempt to treat Donna's state of mind as amounting to a homicidal rage seriously misrepresents the evidence. Nor does it really make any sense. In *People* v *Gerndt*, 244 Mich 622; 222 NW 185 (1928), upon which the Circuit Court heavily relied, the defendant apparently poisoned his wife to get his hands on her property; although obviously criminal and immoral in the extreme, such an act is a rational one, having a recognizable motive. To murder one's small child, *in cold blood* -- the Prosecutor pictures Donna grinding up ninety

pills and dissolving them in a drink, which is about as "cold-blooded" an act as can be imagined -- over an act of petty disobedience, on the other hand, is an act of madness. And there is no evidence that there was anything particularly "disturbed" about Donna Yost. That would not protect her in the face of actual *evidence* that she had given her daughter poison, of course, but this is not the sort of motive that could *substitute* for real evidence.

The Circuit Court also tried to find something suspicious in Donna's failure to mention that Monique was taking Imipramine in her conversation with Det. Vosler about the medications the family was taking. Why would she have done so? The child had supposedly been "weaned" off the drug some months earlier -- there is no evidence that any had been procured more recently than June -- and what remained had been thrown away long ago as far as Donna knew.

The Circuit Court also cited various professionals who had not made diagnoses of clinical depression or suicidal tendencies. The evidence, however, was overwhelming that Monique was a very troubled little girl, who had been sexually molested on several occasions, who was repeatedly teased at school, and who had been diagnosed with a variety of emotional impairments. And, of course, on the day of her death she was being doubly punished -- forbidden to go to Kathy Tomlinson's house for running off and then told to spend the afternoon on the couch for running off again. This was not a happy day for her, and it is not surprising that she may have done something irrational, such as swallowing a lot of pills.

The Circuit Court, at the Prosecutor's urging, also stressed that Donna figured out early that Monique had died from taking Imipramine. It evidently compared this to the situation in

Gerndt, where the husband started to prepare for criminal proceedings as soon as the authorities began looking into his wife's death. In the instant case, on the other hand, Donna did nothing inconsistent with a simple belief that her daughter had suffered a self-inflicted or accidental poisoning. The sequence should be considered. Monique died on Sunday for no immediately apparent reason. Donna went home and checked the status of any poisons and medications that were in the house. She was able to tell Det. Vosler on Tuesday that all the medications were accounted for, not because she was trying to hide something, but because it was the first thing she had checked. The Prosecutor suggested that this was suspicious, but given that accidental poisoning is one of the more common ways these tragedies happen, it made perfect sense to explore that possibility first. Then, on Wednesday, the open bottle of Imipramine, which Donna had thought she had thrown out months earlier, suddenly appeared in the upstairs room, and everything snapped into place in her mind.

The Prosecutor argued that she could not have known that Monique had died of Imipramine poisoning because the toxicology report had not been done. Police and prosecutors may have protocols which prevent them from officially assigning causes of death before the lab tests are back, but the rest of us frequently draw our conclusions from less evidence. Here, a seriously unhappy little girl, with a history of pill-taking behavior, dies suddenly, and a bottle of prescription medicine which had somehow escaped from her mother's control is found where it should not have been. Donna, as she explained it, "put one and one together." There is nothing suspicious involved. Indeed, if Donna *had* used the pills to murder her daughter, she would probably *not* have been so quick to point to them as the cause of death. The probative value of

this "evidence" is nil, and it cannot be used to resuscitate the Prosecutor's floundering case.

In the end, there are certainly "loose ends" in this case and probably always will be. We do not know exactly how Monique came to ingest a lethal dose of Imipramine, nor what her motive was for taking it. The important point is that there is *no evidence* that Donna Yost, or anyone else, gave her those pills. The showing that must be made at a preliminary examination simply was not made -- and certainly not strongly enough that the District Court can be found to have committed a "clear abuse of discretion" in finding insufficient evidence. The dismissal must therefore be upheld.

II

A MAGISTRATE CONDUCTING A PRELIMINARY EXAMINATION MAY EVALUATE THE CREDIBILITY OF TESTIMONY IN DECIDING WHETHER TO BIND A DEFENDANT OVER FOR TRIAL.

STANDARD OF REVIEW

This issue, which was not expressly considered below, is briefed in response to the request of the Supreme Court and so is not, strictly speaking, a "review." If it were, the standard of review would be *de novo* in that it is a question of law and of statutory interpretation. *E g*, *Putkamer* v *Transamerica Ins Co*, 454 Mich 626; 563 NW2d 683 (1997).

DISCUSSION

A

THERE WERE NO CRITICAL CREDIBILITY DETERMINATIONS IN THE INSTANT CASE.

This Court requested that the Parties brief the question:

> [W]hat is the appropriate role of the magistrate at a preliminary examination in assessing the credibility of witnesses and how does that assessment affect the bindover decision[?]

Defendant will address this question below, but as a preliminary matter she submits that there were no actual "credibility" determinations in the instant case.

The critical testimony upon which the Prosecutor relied, and parts of which the District Court rejected, was that of Dr. Kanu Virani and Dr. Michael Evans, respectively the pathologist who performed an autopsy on Monique's body and the toxicologist who found Imipramine in her blood and urine. Only some of the two witnesses' testimony, however, dealt with facts which they had observed, and the veracity of that testimony has not been seriously questioned.

Doctor Virani's testimony can be divided into four categories. First, there were specific facts to which he testified: that he performed an autopsy on Monique's body and that he made certain observations, most importantly that he observed no solid pill residue in the child's stomach. Defendant, of course, reserves the right to impeach this testimony at trial, but so far the testimony has not been impeached and there is no indication that the District Court did not credit it.

Second, Dr. Virani testified as an expert to certain opinions within his field of competency, which is forensic pathology. He testified that, based upon his autopsy and the toxicology report, the probable cause of death was "acute Imipramine intoxication." This also is not seriously disputed. He further testified that there will always be visible, solid residue in the stomach if the decedent has swallowed pills whole. The District Court did not accept his testimony on this latter point, finding that the question was more a matter of pharmacology or pharmaceutics, as to which there was much better testimony from Dr. David Fleisher, as well as conflicting pathology testimony from Dr. Laurence Simson.

Third, Dr. Virani gave opinions on questions which were *not* within his field of expertise. He testified that small children cannot commit suicide, which is more a matter of psychology or psychiatry than pathology, as well as that a child could not take sufficient Imipramine tablets to cause death out of curiosity. This testimony as well was rejected in the District Court, which had before it the testimony of Dr. Alan Berman, who was a specialist in the study of suicide. The Circuit Court, however, refused to recognize these distinctions and held that the District Court had been obliged to credit all of Dr. Virani's testimony, both within and without his field of expertise.

And finally, Dr. Virani made what can only be described as *speculation* when he opined that someone must have ground up the pills and mixed them with a drink to give to Monique. There was no actual evidence for this, only Dr. Virani's statement that, because the pills could not have been swallowed whole, that is one way the Imipramine *might* have gotten into Monique's system. This testimony was clearly rejected, as it should have been.

Similarly, Dr. Evans testified to (1) certain of his own observations as a toxicologist, such as that he performed tests and found a certain level of Imipramine, (2) certain opinions within his own field, such as that this was a lethal level and that it would have taken a certain number of pills to reach it -- actually, his estimate differed significantly from that of Dr. Virani -- and (3) certain opinions outside his field, such as that it was significant that no visible residue was found during an autopsy, which is a pathology question. Again, the District Court credited the witness's testimony as to his own observations, generally accepted his opinions within his field, and rejected those outside his field.

Defendant would ask the Court to keep these distinctions in mind. As will be shown below, judging the *veracity* of a fact witness has always been regarded as the peculiar province of the jury. Insofar as these witnesses testified to observed facts, however, they were evidently believed in the District Court. The acceptance or rejection of the opinion testimony of an expert, on the other hand, has always involved significant participation by the court, which has the discretion to exclude such testimony where the judge finds it unhelpful. Opinion testimony outside the witness's field of expertise, as well as pure speculation, is generally not received at all at trial. Even if the Court holds that a magistrate must credit the fact testimony of a witness in a preliminary examination -- Defendant will argue against this below -- different considerations apply to the crediting of expert opinions, and in this case the District Court did credit both the fact testimony of the critical witnesses and their competent opinions. Accordingly, its decision should be upheld in any event.

B

THE MAGISTRATE IS PERMITTED TO EVALUATE THE CREDIBILITY OF TESTIMONY.

The short answer to the Court's question is that this Court and the Court of Appeals have repeatedly held that a magistrate conducting a preliminary examination not only *may*, but *must*, judge the credibility of witnesses. As the Court explained in *People* v *Paille No 2*, *supra*:

> In determining whether the crime of conspiracy had been committed, the magistrate had not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses.
>
> We have often commented upon the fact that the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words.

383 Mich at 627; 178 NW2d at 468. Or again in *People* v *Talley*, *supra*:

> Part and parcel of the magistrate's function of determining whether an offense has been committed and whether probable cause exists for charging the defendant therewith is the duty of passing judgment on the credibility of witnesses.

410 Mich at 386; 301 NW2d 809. *See also*, *People* v *King*, 412 Mich 145; 312 NW2d 629 (1981). The Court of Appeals reached the same conclusion in *People* v *Harris*, 159 Mich App 401; 406 NW2d 307 (1987):

> In discharging that duty, the magistrate has a duty to pass judgment on the credibility of the witnesses as well as the weight and competency of the evidence, but should not take the place of a trier of fact and discharge a defendant when the evidence conflicts or there is a reasonable doubt as to defendant's guilt. *People* v

Woodland Oil Co, Inc, 153 Mich App 799; 396 NW2d 541 (1986).

159 Mich App at 404; 406 NW2d at 308. *See also*, *People* v *Northey*, 231 Mich App 568; 591 NW2d 227 (1998); *lv den*, 459 Mich 937; 615 NW2d 736 (1998).

Even apart from considerations of *stare decisis*, however, this is the only rule that makes sense in light of both the statutory language, the interpretive principles adopted by the courts, and the underlying purpose of a preliminary examination. Preliminary examinations are purely statutory, *e g*, *People* v *Johnson*, 427 Mich 98; 398 NW2d 219 (1986), and the Legislature has clearly indicated that the magistrate is to consider *both* sides of the evidence in reaching his or her decision. Under MCL 766.12; MSA 28.930:

> After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination *and in the cross-examination of the witnesses in support of the prosecution*.

Emphasis added. This Court has further held that the right to counsel at the preliminary examination, which is a "critical stage," is constitutionally protected. *People* v *Bellanca*, *supra*.

It is axiomatic that statutes are not to be construed to reach absurd conclusions. As this Court stated the rules in *Williams* v *Cleary*, 338 Mich 202; 60 NW2d 910 (1953):

> No rule is better settled than, in construing a statute, effect must be given to every part of it. One part must not be construed so as to render another part nugatory, or of no effect.
>
> * * *

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence.

338 Mich at 207-208; 60 NW2d at 914. Yet if the rule were -- as prosecutors have sometimes argued and the courts have repeatedly denied -- that the magistrate must accept the prosecution evidence at face value, not questioning the credibility of any of the prosecution witnesses, the Legislature's express authorization of cross-examination of those witnesses would make no sense. What is the purpose of cross-examination except to test the strength of a witness's testimony? Indeed, why is it necessary that the defendant be given counsel to begin with if the magistrate is only allowed to listen to the direct examination of the prosecution witnesses? Everything else that happens at the preliminary examination -- both the cross-examination of the prosecution witnesses and the presentation of defense evidence, both of which the Legislature specifically provided for -- would be a waste of everyone's time. The only rational construction of the statute allows the magistrate to consider, among other matters, the credibility of prosecution witnesses.

Furthermore, as was seen in the preceding section, every appellate decision considering the question has agreed that the ultimate decision of the magistrate is to be reviewed for "abuse of discretion," sometimes phrased as "clear abuse of discretion." This, of course, is the most deferential standard of review in common use. If the task of the magistrate were simply a mechanical one of assuring that the prosecution case had some evidence in support of the charge,

however, without going on to consider the *quality* of that evidence, a less deferential standard would be employed. In fact, review would probably be *de novo*, as it is with summary disposition in civil matters. Again, withdrawing the power of magistrates to weigh the credibility of the prosecution testimony would render large parts of the law of preliminary examinations nonsensical.

* * *

Nor would an abrogation of the power of the magistrate to judge credibility make sense in light of the purpose served by the preliminary examination. In recent years, this Court has restricted the power of a trial judge to make credibility determinations contrary to those of a jury in the context of a full trial. In *People* v *Herbert*, 444 Mich 466; 511 NW2d 654 (1993); *overruled in part*, *People* v *Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), the Court held that a trial judge could not base a directed verdict of acquittal on his or her disbelief of the prosecution witnesses.

> Inherent in the task of considering the proofs in the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution. [Citation omitted.]
>
> It is thus not permissible for a trial court to determine the credibility of the witnesses in the course of deciding a motion for directed verdict of acquittal. To the extent that Judge Thorburn's opinion granting a directed verdict was premised upon such an evaluation of the credibility of the prosecution witnesses, it was error.

444 Mich at 474; 511 NW2d at 659-660. The Court went on to hold that the rule would be

different with respect to motions for new trial, where the judge could rely on his or her own disbelief of testimony to find that a verdict was "against the great weight of the evidence" that it "worked an injustice." The Court pulled back from this latter position in *Lemmon*, however, holding that the trial judge could not serve as a "thirteenth juror," and discard the verdict merely because he or she disagreed with the jury's assessment of the witnesses' credibility. Even the *Lemmon* Court, however, was willing to allow the trial judge to reject testimony in extreme cases where necessary to avoid a "serious miscarriage of justice."

> The trial judge's duty to protect the process encompasses a duty to the defendant, to the public, and to *the constitutionally guaranteed role of the jury as determiner of disputed facts*. We hold that fidelity to these principles dictates that, in this category of cases, the judge does not sit as a thirteenth juror. The thirteenth juror principle is an erroneous legal standard. It does not establish that an innocent person had been found guilty, or that the evidence preponderates heavily against the verdict so that it would be a serious miscarriage of justice to permit the verdict to stand.

456 Mich at 647; 576 NW2d 129 (emphasis added). In both of these cases, however, the Court was clearly concerned to protect that special prerogatives of the jury as the finder of fact *at the trial stage*.

The preliminary examination, however, is a separate proceeding which occurs at the outset of the process and in which the jury has no role. Traditionally in the Anglo-American legal system, the grand jury presided over the initial decision to permit a charge. One of its main functions was to block the executive branch from pressing factually unwarranted criminal charges against citizens. As the United States Supreme Court explained in *Wood* v *Georgia*, 370

US 375; 82 S Ct 1364; 8 L Ed 2d 569 (1962)

> Historically, this body has been regarded as a primary security of the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Particularly in matters of local political corruption and investigations is it important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effectively operate in a vacuum. It has been said that the "ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute."

370 US at 390.

Michigan, of course, very early abandoned the routine use of grand juries in favor of the use of informations, *see generally*, *People* v *Reigel*, 120 Mich 78; 78 NW 1017 (1899), but retained the extra step of requiring a judicial evaluation of the prosecution case before an actual charge could be brought. As Justice Cooley noted in *People* v *Annis*, 13 Mich 511 (1865), the preliminary examination, though it was not to substitute for a trial, served the same protective function as had the grand jury.

> The examination, under this statute, was designed, to some extent, to accomplish the purpose of a presentment by a grand jury under the law as it existed before, in protecting a party against being subject to the indignity of a public trial for an offense before probable cause had been established against him by evidence under oath.

13 Mich at 514. *See also*, *Turner* v *People*, 33 Mich 363 (1876). Indeed, the Court in *Sneed* v

People, 38 Mich 248 (1878), suggested that the preliminary examination, which has adversary features, actually provided the accused with *more* protection than had the grand jury. More recently, this Court stated the purpose of the preliminary examination in *People* v *Hunt*, 442 Mich 359; 501 NW2d 151 (1993):

> The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. The preliminary examination thus serves the public policy of ceasing judicial proceedings where there is a lack of evidence.

442 Mich at 362; 501 NW2d 151. *See also*, *People* v *Johnson*, *supra*. And the Eastern District stated the purpose in *U S ex rel Burgess* v *Johnson*, 323 F Supp 72 (ED Mich 1972):

> The preliminary procedures are intended primarily to prevent accused persons from being tried unless there is probable cause to believe that a crime has been committed and that the defendant has committed it; they are intended to prevent unnecessary trials.

323 F Supp at 74.

Clearly the decision whether the magistrate may consider the credibility of witnesses must be made in light of this function of interposing a block between the citizenry and inconsiderate or abusive prosecutions. To hold that the magistrate must accept all prosecution testimony at face value would be to hold that he or she cannot halt a malicious or politically-motivated charge even on flimsy evidence. Bindovers would be all but automatic and could be denied only in the rare case where an inadvertent or incompetent prosecutor had overlooked one of the elements of the offense or similarly left a fatal hole in his or her case. Indeed, it would be

hard to see why the Legislature has maintained a firm requirement for almost a century and a half that preliminary examinations precede informations. If the prosecution's testimony must be accepted without question or consideration, to what extent can there even be an evaluation of the prosecution case, which is the self-evident purpose of a preliminary examination? Is testimony which has not been judged for credibility even "evidence" in any meaningful sense?

For this Court to take the power to judge credibility away from magistrates in preliminary examinations would rob those examinations of any discernible purpose. And that would make no sense at all.

* * *

Even if this Court determines to restrict or eliminate the right of the magistrate to evaluate the credibility of a fact witness, however, Defendant submits that different principles should be applied to the opinion testimony of an expert. In both *Herbert* and *Lemmon*, the Court was dealing with the basic fact testimony of witnesses and held that the traditional role of the jury in evaluating the credibility of witnesses -- in both cases the issues involved the *veracity* of the witnesses in question -- must be respected. An *opinion* witness, however, does not present the same kind of "evidence." The admissibility of expert testimony is governed by MRE 702, which provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

otherwise.

As this Court held in *People* v *Christel*, 449 Mich 578; 537 NW2d 194 (1995), the admission of such testimony is discretionary with the trial court.

> Before permitting expert testimony, the trial court must find that the evidence is from a recognized discipline, as well as relevant and helpful to the trier of fact, and presented by a witness qualified by "knowledge, skill, experience, training, or education . . . ." MRE 702; *People v. Beckley*, 434 Mich. 691, 456 N.W.2d 391 (1990). On request, the trial judge may deem a limiting instruction appropriate and, in certain cases, may exclude the testimony because the probative value of the syndrome evidence is substantially otuweighed by the danger of unfair prejudice. MRE 403; *Beckley*, *supra* at 725, 456 N.W.2d 391 (opinion of Brickley, J.); *id.* at 741, 456 N.W.2d 391 (opinion of Boyle, J.). On appeal, our duty is to review the decision to admit such testimony for an abuse of discretion.

449 Mich at 587; 537 NW2d at 199. *See also*, *People* v *Whitfield*, 425 Mich 116; 388 NW2d 206 (1986); *Siirila* v *Barrios*, 398 Mich 576; 248 NW2d 171 (1972).

This should be contrasted with the way regular evidence is handled. Under MRE 401, all evidence tending to make a material fact more or less likely is "relevant," while under MRE 402, all relevant evidence is presumptively admissible. Consequently, a trial court would not, without serious justification, be entitled to exclude, for example, the testimony of an eye-witness to the offense. The opinion of an expert, on the other hand, must first be vetted for helpfulness to the factfinder, and if the trial court believes that it would not "assist the trier of fact to understand the evidence or to determine a fact in issue," the court may exclude the testimony, subject to review only for abuse of discretion. Accordingly, when a judge determines that a particular expert lacks

qualifications relevant to the question, or that the opinion is not useful, that judge is not usurping the "prerogatives" of the jury, but merely carrying out one of the functions of a trial judge. So when a magistrate conducting a preliminary examination decides to disregard a supposed expert opinion, he or she is merely doing the same thing, making the preliminary decision that every such opinion must pass.

The Court should also keep in mind that among the opinions of Dr. Virani which the District Court rejected, and the Circuit Court held should have been considered, were opinions outside the doctor's area of expertise: that small children cannot commit suicide and, most importantly, that Monique's death was a homicide. If the Court were to recognize a rule which took from the magistrate even the basic power to decide whether the witness is an expert with respect to the particular issue -- or even to ignore speculations by a witness -- then literally anything is both admissible and, at this stage of the proceedings, conclusive. A prosecutor could put anyone on the stand, elicit an "opinion" that the crime occurred or that the defendant is guilty, and demand that the "evidence" be credited and sent on to a full trial. The preliminary examination would be nothing but a "rubber stamp" for the prosecutor's desire to go forward. That cannot be the law.

* * *

In conclusion, Defendant would remind the Court of the "Satanic ritual abuse" panic which swept the country ten or fifteen years ago. Michigan was fortunate in not suffering any of the more extreme abuses, but as the Court is no doubt aware, numerous individuals were brought

to trial, and even convicted, based on the blatantly untrue, if not physically absurd, testimony of alleged child victims and the dubious opinions of "experts" who claimed that sexual abuse could be inferred from a wide variety of apparently innocent observations and that children *never* lie about abuse -- except, of course, when they claim it did not happen. This episode will almost certainly rank with the Salem witch trials, to which it bears a definite resemblance, as among the most shameful in American legal history. The more protections that stand between the citizenry and such abuses the better. A magistrate who can look at the prosecution evidence and say, "There is nothing here." is part of that protection. This Court should not take it away.

III

THE CIRCUIT COURT COMMITTED ERROR IN REVERSING THE DECISION OF THE MAGISTRATE TO REFUSE TO BIND DEFENDANT-APPELLANT OVER FOR TRIAL IN THE INSTANT CASE.

STANDARD OF REVIEW

As seen above, the decision of the magistrate is reviewed for abuse of discretion, so it follows that an intermediate appellate court must respect that discretion. Accordingly, the Court of Appeals has held that the decision of a circuit court is to be reviewed *de novo*. *People* v *Crippen*, 242 Mich App 278; 617 NW2d 760 (2000).

DISCUSSION

Having heard all the evidence, the District Court found no probable cause to believe that a homicide had been committed and refused to bind Donna over. The Circuit Court, though articulating the correct standard for reviewing this determination, substituted its own judgment

for that of the District Court in what was at best an ambiguous case. The Circuit Court also misinterpreted cases previously decided in by this Court and the Court of Appeals as establishing special rules for poisoning deaths. This was clear, palpable error.

As was demonstrated above, the decision of the magistrate in a preliminary examination is reviewed for "abuse of discretion." This Court has repeatedly articulated that standard both for its own review, and for decisions of the circuit courts -- either hearing an appeal, as in this case, or deciding a motion to quash the information where the magistrate has bound the defendant over. It follows logically, that where there is a subsequent appeal, the second appellate court must determine whether the first respected the discretion of the original magistrate. Although Defendant's research has not revealed any statements from this Court to that effect, the Court of Appeals has so held on several recent occasions. Thus, in *People* v *Hudson*, 241 Mich App 268; 615 NW2d 784 (2000), the Court explained:

> A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion. See, generally, *People v Reigle*, 223 Mich App 34, 36; 566 NW2d 21 (1997); *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion. Thus, in simple terms, we review the district court's original exercise of discretion.

241 Mich App at 276; 615 NW2d at 788-789. Or, more succinctly in *People* v *Crippen*, 242 Mich App 278; 617 NW2d 760 (2000):

> Reversal [by the circuit court] is appropriate only if it appears on the record that the district court abused its discretion. [Citation ommitted.] Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion.

242 Mich App at 282; 617 NW2d at 763. *Cf*, *People* v *Abraham*, 234 Mich App 640; 599 NW2d 736 (1999), *lv den* (similar standard for bindover from probate court). That standard should be adopted here. In its response to Defendant's Application for Leave in the Court of Appeals, however, the Prosecutor confused matters somewhat by phrasing the issue as:

> DID THE CIRCUIT COURT ABUSE IT'S [sic] DISCRETION WHEN IT REVERSED THE DECISION OF THE TRIAL COURT AS TO THE NON-BINDOVER OF THE CASE AND REMANDED THE CASE TO THE DISTRICT COURT?

Simply put, it was the *District* Court which had the discretion, not the Circuit.

Since the standard of review is *de novo*, and the propriety of the District Court's decision has already been considered at length, there is no need for an extended discussion here. The District Court, after careful review of the evidence presented, found that there was insufficient evidence to show that Monique's death was a homicide to begin with. The only thing offered was Dr. Virani's opinion that there would have to be solid pill residue in the little girl's stomach

during the autopsy if the pills were swallowed whole -- this was heavily refuted by the scientific evidence -- and his speculation that someone *might* have ground up the pills and mixed them with a drink. The District Court cannot be faulted for refusing to credit this speculation without any actual evidence. When the Circuit Court held that the lower court was obliged to accept the doctor's opinions and speculations, it was clearly trying to substitute its own judgment for that of the District Court, which it was not allowed to do. Accordingly, its decision must be reversed and the decision of the District Court reinstated.

One point, however, calls for special attention. The Circuit Court relied on *People* v *Gerndt*, *supra*, and *People* v *Brown*, 37 Mich App 192; 194 NW2d 560 (1971), as establishing a lower standard for deaths by poison. In *Brown*, there was direct evidence that the defendant had given the decedent a fatal injection, and the Court of Appeals merely held that this was enough to support an inference of intent and malice, making the sole possible crime first-degree murder. *Gerndt* is more significant, but it still does not stand for what the Circuit Court used it for. There, a woman who had been in "rather extraordinary good health" suddenly took ill, for the first time in twelve years, less than a month after her marriage and died after a three-week illness. During that time, her new husband had been the sole person taking care of her and had also procured from her a will in his own favor, as well as conveyances from his wife's elderly foster mother. When the body was exhumed, the husband immediately retained an attorney and began arranging for a bond. The body was found to be without any signs of disease but full of arsenic. Under the circumstances, this Court held that there was enough evidence to bind the defendant over and also to convict him even though no one had seen him in possession of the arsenic nor

seen him give it to his wife. In short, *Gerndt* merely holds that a murder by poisoning can be shown through circumstantial evidence, which Defendant does not dispute. *But there must* be *evidence.* Neither case stands for the proposition that whenever a person dies by poison, there is automatically a murder charge possible against whichever other individual happened to be standing closest.

The Circuit Court also argued that the inherent difficulties in proving a murder by poisoning justify employing a lower standard of proof. That is not what *Gerndt* says, nor is that a road the courts should start down. As the Court is no doubt aware, there have been occasional modifications made to the regular procedural rules in some circumstances to deal with the difficulties of proof of particular crimes. Rape victims may no longer be interrogated about their extraneous sexual activity, nor are child victims of sexual abuse required to undergo all the usual rigors of in-court testimony. But the basic standard of proof has never been lowered merely to make convictions easier. The Circuit Court was in error in suggesting that it should be here.

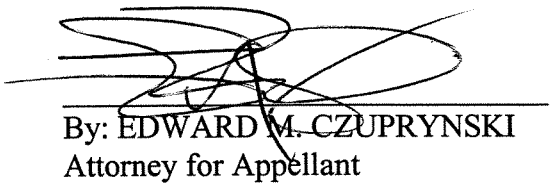
It must be kept in mind that the standard of review is "clear abuse of discretion." This means that there is a class of cases in which a magistrate's decision must be upheld whichever way it goes. Just because this Court affirmed the magistrate's decision to bind over in *Gerndt*, therefore, does not mean that a refusal to do so would have been overturned. *A fortiori*, neither does it mean that a magistrate may not refuse to bind over in the face of significantly less evidence than presented in that case. That is what happened here, and the decision of the District Court must be affirmed.

PRAYER FOR RELIEF

WHEREFORE, Defendant-Appellant DONNA ALICE YOST respectfully prays that this Honorable Court reverse the Order of the Circuit Court and reinstate the decision of the District Court not to bind her over for trial.

Dated: May 13, 2002

Respectfully Submitted,
BAY JUSTICE ASSOCIATES, P.C.



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